Supreme Court, U.S.
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No. 96-953

In The

Supreme Court of the United States

October Term, 1996

MONICA SKRZYPCZAK,
An Oklahoma Citizen,

Petitioner,

vs.

YVONNE KAUGER, ROBERT E. LAVENDER, ROBERT D. SIMMS, HARDY SUMMERS, JOSEPH M. WATT, RALPH B. HODGES, RUDOLPH HARGRAVE, ALMA WILSON and MARIAN P. OPALA, in their official capacities as Justices of the Oklahoma Supreme Court,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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18 pp

QUESTIONS PRESENTED

1. Should this Court allow a federal district court to reverse a final decision of the Oklahoma Supreme Court?

2. Should this Court require the State of Oklahoma to place all state initiative petitions on state-wide ballots, without regard to the constitutionality of the proposed legislation?

3. Did the Petitioner have standing to assert these first two questions in a federal district court action?

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STATUTES INVOLVED

1. Title 28 U.S.C.A. § 1257

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

2. Title 28 U.S.C.A. § 1738

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

3. Article 5, Oklahoma Const. § 2.

The first power reserved by the people is the initiative, and eight per centum of the legal voters shall have the right to propose any legislative measure, and fifteen per centum of the legal voters shall have the right to propose amendments to the Constitution by petition, and every such petition shall include the full text of the measure so proposed. The second power is the referendum, and it may be ordered (except as to laws necessary for the immediate preservation of the public peace, health, or safety), either by petition signed by five per centum of the legal voters or by the Legislature as other bills are enacted. The ratio and per centum of legal voters hereinbefore stated shall be based upon the total number of votes cast at the last general election for the State office receiving the highest number of votes at such election.

4. Title 34 Okla. Stat. § 8.

When a citizen or citizens desire to circulate a petition initiating a proposition of any nature, whether to become a statute law or an amendment to the Constitution, or for the purpose of invoking a referendum upon legislative enactments, such citizen or citizens shall, when such petition is prepared, and before the same is circulated or signed by electors, file a true and

exact copy of same in the office of the Secretary of State and, within ninety (90) days after such filing of an initiative petition, the signed copies thereof shall be filed with the Secretary of State, but the signed copies of a referendum petition shall be filed with the Secretary of State within ninety (90) days after the adjournment of the Legislature enacting the measure on which the referendum is invoked. The electors shall sign their legally-registered name, their address, and the name of the county in which they reside. Any petition not filed in accordance with this provision shall not be considered. When the signed copies of a petition are timely filed, the Supreme Court of the state shall make or cause to be made a physical count of the number of signatures appearing on the petitions. Upon order of the Supreme Court it shall be the duty of the Secretary of State to forthwith cause to be published, in at least one newspaper of general circulation in the state, a notice of such filing and the apparent sufficiency or insufficiency thereof and notice that any citizen or citizens of the state may file a protest to the petition or an objection to the count made by the Supreme Court of the state by a written notice to the Supreme Court of the state and to the person or persons filing the petition, said protest to be filed within ten (10) days after publication. In case of the filing of an objection to the count, notice shall also be given to the party filing a protest, if one was filed. The Supreme Court of the state shall then fix a day, not less than ten (10) days thereafter, at which time it will hear testimony and arguments for and against the sufficiency of such petition. A protest filed by anyone hereunder may, if abandoned by the

party filing same, be revived within five (5) days by any other citizen. After such hearing the Supreme Court of the state shall decide whether such petition be in form as required by the statutes. If the Court be at the time adjourned, the Chief Justice shall immediately convene the same for such hearing. No objection to the sufficiency shall be considered unless the same shall have been made and filed as herein provided.

Provided, that whenever reference is made in this act to the Supreme Court of the state, such reference shall include the members of the Supreme Court of the state or any officer constitutionally designated to perform the duties herein prescribed.

COUNTER-STATEMENT OF THE CASE

Like many other jurisdictions, the State of Oklahoma provides that changes to its Constitution and statutes may be introduced by its citizens. Article 5, Section 2 of Oklahoma's Constitution provides for the enactment of state laws through the process of initiative petition. Title 34, Oklahoma Statutes, Section 8 mandates that citizens file a copy of their proposed petition(s) with the Oklahoma Secretary of State and thereafter supply a sufficient number of signatures within ninety days. Any citizen may then file a protest to the petition, which is decided by the Oklahoma Supreme Court.

On June 29, 1990, Fred W. Sellers, Jr. and Oklahoma Coalition to Restrict Abortion, Inc. (hereinafter referred to as "Coalition") filed petition pamphlets with the Oklahoma Secretary of State seeking to put Initiative Petition

349 on a statewide ballot. Said petition sought to restrict a woman's right to an abortion except in certain prescribed instances. During the approval process of Initiative Petition 349, also designated as State Question 642, the United States Supreme Court decided the case of *Planned Parenthood v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), which dealt with the rights of the states to regulate abortions.

On July 14, 1992, the Oklahoma Supreme Court issued an order requiring the Coalition and others to address the constitutionality of State Question 642 in light of *Casey*. On July 24, 1992, the Coalition filed its brief with the Oklahoma Supreme Court discussing the constitutionality of State Question 642 and questioning the authority of the Oklahoma Supreme Court to review the contents of the petition.

On August 4, 1992, the Oklahoma Supreme Court held that State Question 642 was unconstitutional and ordered it stricken from the ballot. The Court ruled:

> [T]hat when the unconstitutionality of the initiative petition is manifest, a pre-election judicial determination of the issue is both appropriate and necessary to avoid a costly and useless election.

In Re Initiative Petition No. 349, 838 P.2d 1, 2 (Okla. 1992).

The Coalition timely filed for a Writ of Certiorari with the United States Supreme Court, which was subsequently denied. *Oklahoma Coalition to Restrict Abortion, Inc. v. Feldman*, 506 U.S. 1071, 113 S.Ct. 1028, 122 L.Ed.2d 173 (1993). Almost two years later, on August 3, 1994,

Monica Skrzypczak, (hereinafter referred to as "Petitioner"), commenced an action in federal district court, suing the nine Justices of the Oklahoma Supreme Court (hereinafter referred to as "Respondents"), in their official capacities. Said suit sought an injunction against the Respondents compelling them to "complete the State Question 642 initiative petition process without reference to the content thereof". [Petitioner's App., p. 28].

The Respondents filed a Motion to Dismiss the action for lack of subject matter jurisdiction. Respondents argued that federal district courts are generally forbidden by Title 28 U.S.C.A. § 1738 from reviewing state court judgments. The only way to challenge a final decision of the Oklahoma Supreme Court is by way of certiorari to the United States Supreme Court as authorized by 28 U.S.C.A. § 1257. Respondents further argued that the ruling of the Oklahoma Supreme Court in *In re Initiative Petition No. 349* was a final order. As such, it was res judicata, was entitled to full faith and credit, and was not subject to collateral attack in federal district court. The District Court adopted the Respondents' arguments and dismissed the action.

A three judge panel of the Tenth Circuit affirmed, but for different reasons. The circuit court found that the Petitioner's original district court complaint "failed to identify a legally-protected interest that has been invaded and thus has failed to allege an injury in fact". [Petitioner's App., p. 7].

ARGUMENT

SUMMARY OF ARGUMENT

The Petitioner is correct when she characterizes the legal arguments and decisions as "moving target[s]". [Petition, p. 7]. The district court and appellate court both made independent examinations into their jurisdiction, as authorized by this Court. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990). The district court adopted Respondents' full faith and credit argument, but went on to state that it did not have the power to "grant the injunctive relief plaintiff seeks". [Petitioner's App., p. 14]. This argument had not been raised by Respondents at the district court level and was not addressed by them at the Tenth Circuit.

The Tenth Circuit did not comment on the correctness of the district court's ruling, but instead based its decision on the issue of standing. Respondents have not previously addressed the standing issue, but agree with the legal reasoning and ruling of the Tenth Circuit.

It is the Respondents' position that the Oklahoma Supreme Court has jurisdiction to review the legal validity of state initiative petitions prior to submitting them to a vote of the people. It is also the Respondents' position that all citizens of the State of Oklahoma are bound by the Oklahoma Supreme Court's decision in *In re Initiative Petition No. 349*, 838 P.2d 1 (Okla. 1992). Those Oklahoma citizens with standing to contest this ruling have already done so. The Petitioner's belated action filed in the United States District Court was simply an attempt to relitigate issues which had already been properly decided.

The questions presented for review in the Petitioner's Petition For a Writ of Certiorari do not adequately focus the issues involved in this action. Respondents respectfully assert that the questions propounded at the beginning of this Response more accurately reflect the gravamen of Petitioner's complaint, and more concisely show the reasons why certiorari should not be granted. The previous rulings of the district court and court of appeals do not conflict with other jurisdictions. Nor do said rulings depart from the accepted and usual course of judicial proceedings.

REASONS FOR DENYING THE WRIT

Meyer v. Grant

The Oklahoma Supreme Court struck State Question 642 from a state-wide ballot because it was patently unconstitutional. Petitioner contends that said decision was contrary to this Court's holding in *Meyer v. Grant*, 486 U.S. 414, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988). However, as noted by the Tenth Circuit, the facts in *Meyer* are not controlling in this instance. In *Meyer*, this Court held that the State of Colorado could not prohibit the use of paid initiative petition circulators. Oklahoma does not have such a prohibition. The manner in which the petition was circulated was not at issue.

More importantly, the present challenge to the Oklahoma Supreme Court's ruling was brought by a stranger to the initiative petition process. The Petitioner neither submitted State Question 642, nor did she litigate its validity before the Oklahoma Supreme Court. Petitioner

filed her challenge to the Oklahoma Supreme Court's ruling in federal court almost two years later. The federal district court realized that the only way to challenge a final decision of the Oklahoma Supreme Court is by way of certiorari to the United States Supreme Court as authorized by 28 U.S.C.A. § 1257. The ruling of the Oklahoma Supreme Court in *In Re Initiative Petition No. 349* was a final order. As such, it was entitled to full faith and credit and was not subject to collateral attack in federal district court.

Picking and Choosing

Petitioner has suggested in her Petition For a Writ of Certiorari that the Oklahoma Supreme Court is "picking and choosing" among initiative petitions based upon their content. This statement is incorrect to the extent that it implies that other patently unconstitutional petitions have been approved by the Oklahoma Supreme Court. The case of *In re Initiative Petition No. 360, State Question No. 662*, 879 P.2d 810 (Okla. 1994), cited by the Petitioner, does not support her argument. *In re Initiative Petition No. 360* was decided by the Oklahoma Supreme Court prior to this Court's ruling in *United States Term Limits v. Thornton*, ___ U.S. ___, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995). In *In re Initiative Petition No. 360* the Oklahoma Supreme Court approved an initiative petition which sought to limit the terms of Oklahoma's United States senators and representatives.

> "Based on the submissions in this case, we are unconvinced both that the constitutional infirmities lodged by protestants are clear or manifest, or that reaching the merits of those

> challenges would prevent the holding of a costly and unnecessary election. Accordingly, we decline to reach the constitutional challenges lodged by protestants in this case.
>
> Furthermore, we believe another reason militates against deciding definitively the constitutional issue based on the exclusivity of the qualification clauses of Art. I of the United States Constitution. On June 20th of this year the United States Supreme Court granted certiorari in the *U. S. Term Limits, Inc.* case. *U. S. Term Limits, Inc. v. Thornton and Hill*, ___ U.S. ___, 114 S.Ct. 2703, 129 L.Ed.2d 832 (1994). The questions presented include the qualification clause arguments advanced by protestants in this case . . .
>
> In our view, in light of the United States Supreme court's pending determination of this issue . . . it is the better practice to allow a vote of the issue to go forward . . .

In re Initiative Petition No. 360, State Question No. 662, 879 P.2d at 815, 816.

The constitutionality of Initiative Petition No. 360 was not clearly decided until after this Court's ruling in *U. S. Term Limits v. Thornton*, ___ U.S. ___, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995). Had the Oklahoma Supreme Court made its ruling after *United States Term Limits v. Thornton*, the Petitioner's "picking and choosing" argument might have merit. But that is not the case.

The Oklahoma Supreme Court reviews all initiative petitions. As recently as last month, in the case of *In re Initiative Petition No. 364, State Question No. 673*, 1996 WL 709162, 67 Okla.B.A.J. 3874 (Okla. 1996), the Oklahoma

Supreme Court struck an initiative petition from the ballot which would have required all members of the Oklahoma congressional delegation to seek a constitutional convention to require federal term limits. The Court held that the proposed measure was constitutionally invalid.

> We conclude that the measure is facially violative of the constitutions of Oklahoma and the United States and may not be placed on the ballot for submission to the people.

In re Initiative Petition No. 364, State Question No. 673, 1996 WL 709162, p. 2. Had the Oklahoma Supreme Court allowed the question to be put on the ballot, the Petitioner's "picking and choosing" argument might have merit. But again, that is not the case.

American Booksellers

Petitioner contends that the Tenth Circuit's ruling was contrary to this Court's holding in *Virginia v. American Booksellers Assn.*, 484 U.S. 383, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988). However, the facts in *American Booksellers* are not controlling in this instance. *American Booksellers* involved a Virginia statute making it unlawful for any person to display materials harmful to minors for commercial purpose, in a manner whereby juveniles could examine and peruse said materials. An action was brought by booksellers alleging that the law violated their rights and the rights of their customers. This Court allowed the booksellers to assert the first amendment rights of their customers, but only after finding that the plaintiffs themselves were threatened with actual injury.

In its ruling, the Court in *American Booksellers* cited the case of *Secretary of State of Maryland v. J. H. Munson Co.*, 467 U.S. 947, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984). The complaint in *Munson* was filed by a professional for-profit fundraising organization challenging a Maryland state statute which limited the rights of charitable organizations to raise funds. Even though the statute was directed at charitable organizations, the Court held that the for-profit company had standing. The Court noted that "[T]he crucial issues are whether Munson satisfies the requirement of 'injury-in-fact,' and whether it can be expected satisfactorily to frame the issues in the case." *Secretary of State of Maryland v. J. H. Munson Co.*, 81 L.Ed.2d at 797. The Court did not waive the injury-in-fact requirement, but merely allowed that party sustaining the injury to bring an action to protect the rights of others.

CONCLUSION

In the case of *In Re Initiative Petition No. 349*, 838 P.2d 1 (Okla. 1992) the Oklahoma Supreme Court ruled that State Question 642 was unconstitutional and refused to put it on a state-wide ballot. The proponents of State Question 642 had vehemently argued that such an action by the court would be an impermissible prior restraint on core political speech in violation of *Meyer v. Grant*, 486 U.S. 414, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988). Two years later Petitioner made the same arguments in a federal district court action. The district court correctly ruled that it did not have jurisdiction to review a final decision of the Oklahoma Supreme Court. The Tenth Circuit subsequently held that Petitioner lacked standing to bring the

action because she had not alleged an injury-in-fact. These rulings of the District Court and Tenth Circuit are not in conflict with other jurisdictions or the Supreme Court. Respondents respectfully request that certiorari be denied.

Dated, Oklahoma City, Oklahoma, January 13, 1997.

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